*THE HON'BLE SRI JUSTICE P.S. NARAYANA

+A.S.No.1361 of 2004

%27-7-2004

#Ramji Patel and another

..Appellants

Vs.

$Irukulla Narender and others

..RESPONDENTS

<GIST

>HEAD NOTE

!COUNSEL FOR APPELLANTS : Sri Ganshyam Das Mandani

^COUNSEL FOR RESPONDENTS : Sri Vilas Afzulpurkar

Sri K.V.Bhanu Prasad

?CASES REFERRED:

1990(1) An.W.R. 475

[2] AIR 1925 Madras 492

[3] AIR 1968 Madras 142

[4] AIR 1976 A.P. 395

[5] **AIR 1979 NOC 124 (All.)**

[6] **1997(4) ALD 310**

[7] **(1978) 3 SCC 383**

[8] **AIR 1968 A.P. 334**

[9] **AIR 1967 S.C. 744**

[10] **AIR 1977 S.C. 774**

[11] **AIR 1980 S.C. 1334**

[12] **1999(1) Cal.L.T. 480 (HC)**

THE HON'BLE SRI JUSTICE P.S. NARAYANA

A.S.No.1361 of 2004

JUDGMENT:-

This is a typical unfortunate long drawn litigation wherein the successful plaintiff Irukulla Narender, 1st respondent in this Appeal, petitioner in I.A.No.592/85 in O.S.No.7/71 on the file of District Judge, Warangal is unable to obtain a final decree in pursuance of the preliminary decree.

Heard Sri Ganshyam Das Mandani, Counsel representing the appellants and Sri Vilas Afzulpurkar and Sri Bhanu Prasad, Counsel representing the 1st respondent/petitioner/plaintiff.

The facts in nut-shell are as hereunder :

The present Appeal is preferred by the appellants/defendants 2 and

3 in the suit, aggrieved by an order dated 5-12-2003 made in I.A.No.582/85 in O.S.No.7/71 on the file of District Judge, Warangal. The parties herein would be referred to as plaintiff, 1st defendant, 2nd defendant and 3rd defendant, who are appellants herein, for the purpose of convenience. The plaintiff filed a suit for partition and separate possession on 9-8-1971 for his 3/4th share as heir of Irukulla Shankaraiah who died on 3-10-1969 claiming to be the adopted son. The 1st defendant entered into an agreement of sale relating to item No.2 of the plaint A schedule on 3-6-1971 and it is stated that no sale deed had been obtained by defendants 2 and 3/appellants herein, till now. There appears to be no controversy between defendants 1, 2 and 3 in respect of the agreement of sale. Defendants 2 and 3 filed written statement pleading about the agreement of sale referred to supra and also for working out equities, but however remained exparte. Initially, the suit was dismissed on 18-9-1976 but the same was reversed by this Court in A.S.No.148/77 wherein defendants 2 and 3 also were parties who did not contest the matter at least raising the ground of equity. The 1st defendant carried the matter to the Apex Court in C.A.No.4208/86 and in the said Civil Appeal in view of the pitiable condition of the 1st defendant, the plaintiff had abandoned all claims relating to movables and mesne profits and thus the right of the plaintiff to have the relief of partition was upheld by the Apex Court by Judgment dated 10-11-1986. In

pursuance of the same, the plaintiff moved an application I.A.No.592/85 in O.S.No.7/71 on the file of District Court, Warangal for passing of final decree. The plaintiff had examined himself as PW-1 and on behalf of defendants 2 and 3, RW-1 and RW-2 were examined and Exs.B-1 to B-16 were marked. On 11-6-1987, an Advocate Commissioner was appointed to assist the valuation of the buildings and the same is as hereunder :

Item No. Suit valuation As per Additional Report

O.S.No.7/71 Report Report Dt.21-2-1990

On 9-8-1971

No.1 35,000 4,97,000/- 4,97,000 3,72,000/-

8/835

Girmajipet

No.2 40,000 8,51,339/- 8,51,379/- 11,90,000/-

9/497 &

498

No.3 1,50,000/-

Open plot

Measuring

Ac.0-36 Gnts.

Narsampet

road

On appreciation of the oral and documentary evidence, the learned District Judge at para-25 made the following order :

> "In the result, the petition is allowed rejecting the contentions raised by the respondents No.2 and 3 and directing the division of the properties as per preliminary decree. Sri P.Muralidhar, Advocate is appointed as Commissioner to divide the plaint schedule properties into four shares and allotment of three shares to the petitioner and one share to the 1st respondent keeping the quality of good and bad. His fee is fixed tentatively at Rs.2,000/- and he shall file report on or before 30th January 2004. The respondents No.2 and 3 are directed to pay a sum of Rs.2000/- p.m. from the date of petition till this date and Rs.5000/- p.m. from the date of this order till the date of delivery. On such deposit, the amount shall be shared by the petitioner and the 1st respondent proportionate to their shares of 3/4th and 1/4th. The decree for profits shall be prepared on payment of Court fee. Call on 30.1.2004 for report of Commissioner."

Aggrieved by the said order, defendants 2 and 3 had preferred the present Appeal.

Sri Ganshyamdas Mandani, the learned Counsel representing the appellants commented that the twin principal grounds on which the learned District Judge, Warangal had arrived at a conclusion relating to the non-participation of these parties in the original proceedings and Section 54 of the Transfer of Property Act 1882 would not create any interest and hence the doctrine of equity cannot be invoked, definitely cannot be sustained for the reason that there was no

necessity or occasion for these parties to participate in trial or at the appellate stage, as the case may be, since there is no controversy at all relating to the agreement of sale executed by the 1st defendant and in fact it is also within knowledge of the plaintiff. The learned Counsel also would submit that the other ground that no interest would be created in the light of Section 54 of Transfer of Property Act 1882 also cannot be sustained since even an agreement holder as a person having interest in the property can claim equity. The learned Counsel also submitted that even otherwise no issue was framed regarding the agreement of sale and inasmuch as all the parties had proceeded on the ground that the 1st defendant in fact executed an agreement of sale, there is no question of holding that by virtue of non-participation of these parties in the original proceedings and the appellate proceedings, they are precluded from raising the doctrine of equity. The learned Counsel no doubt made elaborate submissions relating to the applicability of the doctrine of equity and also the value of the property and the possibility of working out equity and also would contend that especially in the light of the stand taken by the 1st defendant, there may not be any difficulty at all in working out, if possible, by allotting this property to the share of the 1st defendant. The learned Counsel also had pointed out to the oral and documentary evidence available on record. A faint attempt also was made to point out that at any rate the relief of mesne profits definitely

cannot be granted. The learned Counsel placed reliance on certain decisions to substantiate his contentions.

Per contra Sri Vilas Afzulpurkar and Sri Bhanu Prasad representing the 1st respondent/plaintiff had traced the history of the litigation and would submit that taking all the facts and circumstances into consideration, the learned District Judge, Warangal had passed just an equitable order which deserves no disturbance at the hands of this appellate Court. The learned Counsel also had taken this Court through the findings recorded by the learned District Judge, Warangal and also had touched several provisions of the Transfer of Property Act 1882 inclusive of Sections 54, 40 and 44 of the said Act. The learned Counsel also in all fairness would submit that as far as the share of the 1st defendant is concerned, it is between defendants 1, 2 and 3 to work out since there may not be any conflict of interest in between those defendants interse, but as far as the plaintiff is concerned, especially in the light of the fact that despite the notice issued by the plaintiff as an adopted son warning defendants 2 and 3 relating to the transaction inasmuch as they proceeded with in a malafide way, even on facts the doctrine of equity cannot be invoked. The learned Counsel also would contend that inasmuch as a mere agreement holder would not get any interest in the property as such definitely such agreement holder cannot try to take shelter under doctrine of equity. The learned Counsel also submitted that reasons

in detail had been recorded how without paying any amount defendants 2 and 3 have been in unauthorized occupation of the said property and hence a just and equitable order relating to mesne profits had been made and the same cannot be found fault. The learned Counsel also had placed reliance on certain decisions to substantiate their contentions.

Heard the Counsel on record and perused the oral and documentary evidence available on record and also the findings recorded by the Court of first instance.

Several of the facts already had been narrated supra and the said details need not be repeated again. On behalf of the plaintiff, PW-1 was examined. Likewise, on behalf of defendants 2 and 3, RW-1 and RW-2 were examined and Ex.B-1 dated 8-6-1971 agreement of sale executed by the 1st defendant, Exs.B-2, B-3 and B-4 receipts, Exs.B-5 to B-11 municipal tax receipts, Ex.B-12 (Ex.A-29), Ex.B-13 (Ex.A-30) and Ex.B-14 (Ex.A-31) suit notice, Ex.B-15 yet another receipt and Ex.B-16 valuation certificate given by Joint Sub Registrar, Warangal, were marked. The learned District Judge, Warangal framed the following Points for consideration:

1. Whether the objections raised by respondents No. 2 and 3 about their right in item No.2 of 'A' schedule property under an agreement of sale and claiming right of equity is true, valid and sustainable ?

2. Whether the petitioner is entitled for partition of the

properties as prayed for ?

The learned District Judge, Warangal had discussed these Points at paras 9 to 24 and ultimately had rejected the contentions of defendants 2 and 3 and made the order, the operative portion of the same already had been specified supra. In the light of the rival contentions advanced by both the Counsel, the following Points arise for consideration in this Appeal :

1. Whether the appellants in the facts and circumstances are entitled to claim equity ?
2. If so, to what relief the parties are entitled to ?

Point No.1 : Defendants 2 and 3 are claiming equity on the strength of an agreement of sale executed by 1st defendant dated 3-6-1971. As already referred to supra, it is not in controversy that whatever the reasons may be, till now a regular registered sale deed was not executed in pursuance of the agreement of sale by the 1st defendant in favour of defendants 2 and 3. Apart from the factual details, elaborate submissions were made on the principal contention relating to invoking the doctrine of equity vis-à-vis an agreement holder. In **K.ADIVI NAIDU Vs. E.DURVASULU NAIDU** it was held that an

application by an alienee for deletion of items purchased by him at the time of passing of final decree is not maintainable but he may request the Court to work out the equity by allotting the property purchased by him to the share of his alienor and the Court while working out equity has to take into consideration the date of alienation and not the date of deletion of properties at the instance of either of the parties. In **VENKATARAMAYYA Vs. J.RAGHAVALU** a learned single Judge of Madras High Court held :

> "The next point urged by Mr.Lakshmanna is that the agreement, Ex.A, relates only to two items of the family property and that the Court should not decree specific performance in respect of specific items of property, contracted to be conveyed by a member of joint Hindu family, before partition. He strongly relies upon the observation of Sankaran Nair, J., in *Subba v. Venkatasami* (4). The learned judge observed at page 1192 :
>
> "If the learned Judges intended to go further and lay down that if a junior member of a Hindu family agrees to sell any specific property, belonging to his family, a decree may be passed against him, to sell his share of that specific property. I am unable to agree with that view."
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> This observation is dissented from, in *Baluswami Aiyar v. Lakshmana Aiyar* (5). Kumaraswami Sastriar.,J., who delivered the leading judgment in that case, comes to the conclusion that specific items of immovable property could be contracted to be sold by a member of the joint Hindu family, before he divides his share from the other members. I do not think any hard and fast rule can be laid down, as regards this. If there are numerous items of property and if the joint family consists of a large number of members, it would not be proper for any member to alienate any specific item, in favour of a stranger and insist upon that item being conveyed to his vendee. Whether it is an actual sale, or contract of sale, the question whether the vendee, or one who has contracted to buy a specific item of the joint family property, should be given that item would depend upon the circumstances of each case. Whereas, in this case, there are only two items of land and

both of them are capable of equal division; and where there are only two members of the family, the first and second defendants, it would not be right to say that the plaintiff is not entitled to the half share of the first item. Each case must depend upon the circumstances and no hard and fast rule should be laid in cases like these. The Courts should see whether the parties are likely to suffer by enforcing any hard and fast rule. If members of a joint family are not likely to suffer by giving the vendee or the person who has contracted to buy a specific item of the family property, the Court should give him that item. In this case, as I have already said there are only two items of property. There can be no ground at all, either in law or in equity, to deny the plaintiff the right to a half share of the plaint item."

The Counsel for the appellants also placed strong reliance on **G.M.V.KRISHNAMACHARI Vs. M.D.DHANALAKSHMI AMMAL** wherein the learned single Judge of the Madras High Court at para-25 observed :

"Finally I am unable to agree with the contention of learned Counsel for the respondent that the applicant is converting the suit for partition into a suit for specific performance and that too without the payment of any Court fee. This contention proceeds upon a misapprehension of the real position. The applicant will not get any relief by way of specific performance in this suit and this he can obtain only in a separate suit of his own. He is impleaded only for the limited purpose of (a) establishing that the property is the separate property of his vendor the first defendant; or alternatively (b) for suggesting to the Court that without prejudice to the interests of the plaintiffs the property agreed to be sold may be allotted to the share of the first defendant, so that in a separate suit of his own he can neither obtain specific performance or enforce a charge under Section 55(6)(b) against the property in the hands of the first defendant after a final allotment in the partition suit."

The learned Counsel also had drawn the attention of this Court to **VADLA KRISHNAIAH Vs. NELLI NARASIMHAREDDY , M/s.B.S.**

BANSAL PVT. LTD. Vs. BHAGWAN SWARUP MATHUR , PADMINI CO-OPERATIVE HOUSING SOCIETY Vs. SIRAJUNNISA BEGUM , GURUPAD KHANDAPPA MAGDUM Vs. HIRABAI KHANDAPPA MAGDUM and **KARRI MAHALAKSHMI Vs. SATYAVOLU VENKATA BHASKARA UMAMAHESWARA VARAPRASADA MURTHI** to substantiate his contentions.

In **RAM BARAN PRASAD Vs. RAM MOHIT HAZRA** the Apex Court held :

> "In the case of an agreement of sale entered into prior to the passing of the Transfer of Property Act, it was the accepted doctrine in India that the agreement created an interest in the land itself in favour of the purchaser. For instance, in Fati Chand Sahu v. Lilambar Singh Das, (1871) 9 Beng.LR. 433 (PC), a suit for specific performance of a contract for sale was dismissed on the ground that the agreement, which was held to create an interest in the land, was not registered under S.17, Cl.(2) of the Indian Registration Act of 1866. Following this principle, Mr.Markby,J in Tripoota Soonduree v. Juggur Nath Dutt, (1874) 24 Suth.W.R.321, expressed the opinion that a covenant for pre-emption contained in a deed of partition, which was unlimited in point of time, was not enforceable in law. The same view was taken by Baker,J in Allibhai Mahomed v. Dada Alli Isap, AIR 1931 Bom. 578, where the option of purchase was contained in a contract entered into before the passing of the Transfer of Property Act. The decision of the Judicial Committee in Maharaj Bahadur Singh v. Bal Chand, 48 Ind. App. 376 : (AIR 1922 P.C. 165), was also a decision relating to a contract of the year 1872. In that case, the proprietor of a hill entered into an agreement with a society of Jains that, if the latter would require a site thereon for the erection of a temple, he and his heirs would grant the site free of cost. The proprietor afterwards alienated the hill. The society, through their representatives, sued the alienees for possession of a site defined by boundaries, alleging notice to the proprietor requiring that site and that they had taken possession, but been dispossessed. It was held by the Judicial Committee was of the opinion that the agreement

conferred on the society no present estate or interest in the site, and was unenforceable as a covenant, since it did not run with the land, and infringed the rule against perpetuity. Lord Buckmaster who pronounced the opinion of the Judicial Committee observed as follows :

"Further, if the case be regarded in another light-namely, an agreement to grant in the future whatever land might be selected as a site for a temple-as the only interest created would be one to take effect by entry at a later date, and as this date is uncertain, the provision is obviously bad as offending the rule against perpetuities, for the interest would not then vest in presenti, but would vest at the expiration of an indefinite time which might extend beyond the expiration of the proper period."

But there has been a change in the legal position in India since the passing of the Transfer of Property Act. Section 54 of the Act states that a contract for sale of immovable property does not, of itself, create any interest in or charge on such property." Section 40 of the Act is also important and reads as follows :

"40. Where, for the more beneficial enjoyment of his own immovable property, a third person has, independently of any interest in the immovable property of another or of any easement thereon, a right to restrain the enjoyment in a particular manner of the latter property, or

where a third person is entitled to the benefit of an obligation arising out of contract, and annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon,

such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation nor against such property in his hands."

The second paragraph of S.40 taken with the illustration establishes two propositions : (1) that a contract for sale does not create any interest in the land, but is annexed to the ownership of the land, and (2) that the obligation can be enforced against a subsequent gratuitous transferee from the vendor or a transferee for value but with notice. Section 14 of the Act states as follows:

"14. No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons

living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong."

Reading S.14 along with S.54 of the Transfer of Property Act it is manifest that a mere contract for sale of immovable property does not create any interest in the immoveable property and it, therefore, follows that the rule of perpetuity cannot be applied to a covenant of pre-emption even though there is no time limit within which the option has to be exercised. It is true that the second paragraph of S.40 of the Transfer of Property Act makes a substantial departure from the English law, for an obligation under a contract which creates no interest in land but which concerns land is made enforceable against an assignee of the land who takes from the promisor either gratuitously or takes for value but with notice. A contract of this nature does not stand on the same footing as a mere personal contract, for it can be enforced against an assignee with notice. There is a superficial kind of resemblance between the personal obligation created by the contract of sale described under S.40 of the Act which arises out of the contract, and annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon and the equitable interest of the person purchasing under the English Law, in that both these rights are liable to be defeated by a purchaser for value without notice. But the analogy cannot be carried further and the rule against perpetuity which applies to equitable estates in English law cannot be applied to a covenant of preemption because S.40 of the statute does not make the covenant enforceable against the assignee on the footing that it creates an interest in the land."

In **NARANDAS Vs. S.A. KANTAM** the Apex Court held :

"A contract of sale does not of itself create any interest in, or charge on, the property. This is expressly declared in Section 54 of the Transfer of property Act. See Rambaran Prosad v. Ram Mohit Hazra (1967) 1 SCR 293 = (AIR 1967 SC 744). The fiduciary character of the personal obligation created by a contract of sale is recognized in Section 3 of the Specific Relief

Act, 1963, and in Section 91 of the Trusts Act. The personal obligation created by a contract of sale is described in Section 40 of the Transfer of property Act as an obligation arising out of contract and annexed to the ownership of property, but not amounting to an interest or easement therein.

In India, the word “transfer” is defined with reference to the word “convoy”. The word “transfer” in English law in its narrower and more usual sense refers to the transfer of an estate in land. Section 205 of the Law of Property Act in England defines : “Conveyance” includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument. The word “conveys” in Section 5 of the Transfer of Property Act is used in the wider sense of conveying ownership.”

In **BAI DOSABAI Vs. MATHURDAS** the Apex Court observed :

“We do not wish to go in any detail into the question whether the English Equitable doctrine of conversion of realty into personalty is applicable in India. However, we do wish to say that the English doctrine of conversion of realty into personalty cannot be bodily lifted from its native English soil and transplanted in statute-bound Indian law. But, we have to notice that many of the principles of English Equity have taken statutory form in India and have been incorporated in occasional provisions of various Indian statutes such as the Indian Trusts Act, the Specific Relief Act, the Transfer of Property Act etc., and where a question of interpretation of such Equity based statutory provisions arises we will be well justified in seeking aid from the Equity source. The concept and creation of duality of ownership, legal and equitable, on the execution of an agreement to convey immovable property, as understood in England is alien to Indian Law which recognizes one owner i.e., the legal owner : vide Rambaran Prasad v. Ram Mohit Hazra (1967) 1 SCR 293 : (AIR 1967 S.C. 744) and Narandas Karsondas v. S.A. Kamtam (1977) 2 SCR 341 : (AIR 1977 S.C. 774). The ultimate paragraph of Section 54 of the Transfer of Property Act expressly enunciates that a contract for the sale of immovable property does not, of itself, create any interest in or charge on such property. But the ultimate and penultimate paragraphs of Section 40 of the Transfer of Pty Act make it clear that such a

> contract creates an obligation annexed to the ownership of immovable property, not amounting to an interest in the property, but which obligation may be enforced against a transferee with notice of the contract or a gratuitous transferee of the property. Thus, the Equitable ownership in property recognized by Equity in England is translated into Indian law as an obligation annexed to the ownership of property, not amounting to an interest in the property, but an obligation which may be enforced against a transferee with notice or a gratuitous transferee."

In **AMIYA KUMAR BASU Vs. PANKAJ Kr.CHAKRABORTY** it was held that a contract of sale does not create any interest in or charge on the property and the petitioner is not directly interested in the partition of the suit property and therefore the petitioner could not be necessary party for effectual and complete adjudication of the controversies raised in the suit and on the other hand the presence of the petitioner in the suit for partition may cause prejudice to parties to the suit.

In the light of the facts which are not in controversy at all inasmuch as the appellants/defendants are claiming equity only as agreement holders, definitely they cannot claim any equity. The plaintiff is not concerned with the understanding, if any, in between the 1st defendant and defendants 2 and 3. Apart from this aspect of the matter, the benefits of the parties also may have to be looked into while invoking the doctrine of equity in an action of this nature. The conduct of defendants 2 and 3, in my considered opinion, also would not justify invoking the doctrine of equity in their favour. A careful

scrutiny of the notices and also the fact that these parties were not interested in agitating the question of equity during the pendency of the litigation, I am of the considered opinion that a mere agreement holder definitely cannot seek the benefit by invoking the doctrine of equity. Equity jurisdiction and the powers resulting therefrom can be invoked only in relation to bona fide transactions and definitely this is not such a case and hence the elaborate contentions advanced on this aspect are liable to be rejected. Taking the over-all facts and circumstances into consideration, the learned District Judge, Warangal had arrived at the correct conclusion by fixing some amount as mesne profits also which need not be disturbed. In the light of the elaborate findings recorded by the learned District Judge, Warangal, I am of the considered opinion that absolutely there are no valid or tenable reasons to disturb the said findings and accordingly the said findings are hereby confirmed.

Point No.2 : In view of the foregoing discussion, the Appeal is bound to fail and accordingly the Appeal shall stand dismissed, with costs.

-7-2004

L.R. copy to be marked : YES / NO

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